

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON COMMERCE**  
**SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS**

**Statement by**

**Jeffrey L. Leiter, Esq.**

**on behalf of the**

**National Association of Convenience Stores**

**and the**

**Society of Independent Gasoline Marketers of America**

**on H.R. 688, the**

**"Leaking Underground Storage Tank Trust Fund Amendments Act of 1997"**

**March 20, 1997**

**Washington, D.C.**

## **SUMMARY**

- NACS and SIGMA support H.R. 688, as introduced.
- The 85 percent or greater pass-through of the annual LUST Trust Fund appropriations to the States is important, particularly because it is the goal of EPA's Office of Underground Storage Tanks to build strong State UST programs.
- The expanded, allowable uses of the annual LUST Trust Fund appropriations by the States are legitimate uses of the Federal funds, particularly for enforcement. The States should have greater flexibility to address their unique UST problems.
- State tank trust fund uses of the LUST Trust Fund appropriations beyond administrative expenses are properly limited to an appropriate "financial hardship" test.

Thank you, Mr. Chairman. My name is Jeffrey L. Leiter. I am a member of the Washington, D.C. law firm of Collier, Shannon, Rill & Scott, PLLC. I appear today on behalf of our clients, the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA). The Associations appreciate this opportunity to present their views on H.R. 688, the bill introduced by Representatives Dan Schaefer (R-CO) and Bart Stupak (D-MI) and 58 other Members. SIGMA and NACS support H.R. 688, as introduced, and urge its prompt consideration and enactment.

### **Introduction of NACS and SIGMA**

NACS is a trade association representing more than 1,700 retail members operating convenience stores in the United States and around the world. NACS member companies operate more than 60,000 convenience stores across the nation and employ over 500,000 workers nationwide. Over 70 percent of the convenience stores owned by NACS members retail gasoline and diesel fuel, selling an average of 81,000 gallons of gasoline each month.

SIGMA is an association of over 270 independent gasoline marketers operating in all 50 states. In 1995, SIGMA members sold nearly 31 billion gallons of motor fuel, representing about 21 percent of all motor fuels sold in the United States. SIGMA members supply over 28,600 retail outlets across the nation and employ over 208,000 workers nationwide.

SIGMA publishes an annual statistical report, which is a "snapshot" of the size and scope of the companies the Association represents. It is interesting to note that the total environmental expenditures by SIGMA member companies in 1995 exceeded \$2.3 million per company, or \$28,100 per owned outlet. The Association currently is in the process of collecting 1996 data; however, I expect the environmental expenditure numbers to be comparable.

SIGMA also has surveyed its members where they stand relative to the Environmental

Protection Agency's (EPA) December 22, 1998 deadline for upgrading, replacing or closing "existing" underground storage tanks (USTs). In the aggregate, SIGMA members report that 70.4 percent of the outlets they supply already meet the 1998 standards, and they expect to have an additional 24.4 percent up to standards by the deadline. The remaining 5.2 percent of the outlets likely will be closed, rather than be upgraded. Thus, SIGMA members' reported compliance rate with the 1998 deadline appear to be above those estimated by EPA and State UST officials.

NACS and SIGMA testified before the Subcommittee last July 26 on H.R. 3391, the original measure introduced by Representatives Schaefer and Stupak. The Associations supported that bill, along with subsequent modifications worked out by Subcommittee staff. The revised legislation was overwhelmingly approved last September by the full House of Representatives. H.R. 688 is identical to the House-passed bill. Accordingly, SIGMA and NACS today reaffirm their support for the legislation.

### **Background**

Since the LUST Trust Fund legislation was first considered last Summer by the Subcommittee, little has changed with the regulation of USTs that would cause NACS and SIGMA to alter their views toward the need for or the content of H.R. 688. Moreover, despite significant expenditures by regulated entities, including SIGMA and NACS members, much remains to be done. As of December 9, 1996, EPA's Office of Underground Storage Tanks (OUST) reports that there have been 317,488 confirmed UST releases, while only 152,683 clean-ups have been completed. Approximately 600 new releases are reported each week. EPA, States and tank owners are moving rapidly to close this gap through the implementation of "risk-based corrective actions" -- an approach supported by NACS and

SIGMA.

At the same time, there is the need for a strong enforcement presence to ensure that UST owners and operators are living up to their regulatory responsibilities and that a "level playing field" exists. SIGMA and NACS members, along with other responsible tank owners and operators, have made substantial expenditures to comply with EPA and State UST upgrade, leak detection and financial responsibility deadlines. Their competitive viability should not be injured by a lack of or "half-hearted" commitment to enforcement. Further, as EPA and the States adjust to smaller budgets, it becomes even more imperative that an extremely diverse regulatory community know and see vigorous enforcement as a key to preventing and minimizing tank leaks.

When Congress created the LUST Trust Fund in 1986, it required that UST owners and operators demonstrate the financial ability to clean-up releases and compensate third parties for bodily injury and property damage. SIGMA and NACS -- both then and now -- agree that tank owners and operators must be responsible for any impairments they create.

One financial assurance mechanism Congress encouraged -- and essentially created -- was the State tank trust fund. The State tank trust fund is an entirely different mechanism than the Federal LUST Trust Fund -- and, intentionally, Superfund. The State-run and financed mechanisms enable tank owners and operators to demonstrate compliance with EPA's financial responsibility rules for petroleum USTs and reimburses them for certain clean-up costs beyond a front-end "deductible" up to specified "caps." Nearly all States have created a tank trust fund, and the most recent annual survey by State tank trust fund administrators reports that 19 States' funds currently have claims that exceed their unobligated balances (up from 11 in 1995).

It is against this partial backdrop that H.R. 688 is being considered. As EPA and the States' UST regulatory programs continue to evolve, Congress, the Agency, the regulated community and others need to assess the uses of the LUST Trust Fund and make necessary adjustments. H.R. 688 does this.

**At Least 85 Percent of the LUST Trust Fund Appropriation Should Go to the States**

NACS and SIGMA support the central element of H.R. 688 – that is, codifying EPA's historical practice by requiring at least 85 percent of its annual appropriation from the LUST Trust Fund be distributed to the States through cooperative agreements. The States generally have and continue to use these monies to operate their UST corrective action programs, which oversee responsible party clean-ups – that is, corrective actions by tank owners and operators. Clean-ups remain a priority under H.R. 688.

There does not appear to be any debate that the Federal UST law creates an unfunded – or, underfunded – mandate for the States. However, EPA, in its testimony last Summer on H.R. 3391, has questioned a statutory 85 percent minimum State share, arguing that its past behavior should be indicative of its intent to provide the majority of future, annual appropriations to the States. Moreover, the Administration, in the closing days of the 104th Congress, opposed H.R. 3391 in the Senate on the basis that the 85 percent threshold was somehow violative of the Executive Branch's budgetary process and could set precedents for other environmental programs, such as Superfund.

SIGMA and NACS are not persuaded by EPA's previously articulated argument and believe the Administration's opposition from last Fall is misplaced. The Associations, as opposed to their testimony last July, now understand that EPA has withdrawn a budget proposal that would have

phased out OUST, beginning in fiscal year 2001. Nevertheless, even with the rejection of this proposal, it is reasonable for the regulated community to expect a reduced Federal role in the future. OUST has as one of its priorities the approval of as many of the remaining State UST programs as possible. Once approved by EPA, the State tank programs operate in lieu of the Federal UST regulations. Thus, if it makes good public policy for EPA to encourage and build strong State UST programs, Congress should send a clear message to the States that LUST Trust Fund monies should not and will not be compromised by EPA or the Office of Management and Budget (OMB) at a time when the Federal UST program is depending on the States to do more. A "trust us" approach just does not make sense.

Further, while NACS and SIGMA understand that the allocation and expenditure of the annual LUST Trust Fund appropriations are intertwined with EPA's overall budget, the Associations fail to understand how a statutory 85 percent threshold disrupts the Executive Branch's budget process. Unless EPA and OMB budget analysts have some future plans for keeping a significant percentage of the LUST Trust Fund appropriations "in house," the Administration seems to be "drawing a line in the sand" over, at most, three or four historical percentage points or, stated differently, three or four million dollars. SIGMA and NACS find it hard to believe these amounts, while beneficial to State UST programs carrying out a Federal mandate, will "break" EPA's budget. Hopefully, EPA will explain more fully its and the Administration's position and thinking on this point at today's hearing.

#### **Allowable LUST Trust Fund Uses Should be Expanded**

SIGMA and NACS support the expanded uses of the LUST Trust Fund monies by the States as set forth in Subsection (1) of H.R. 688, particularly for enforcement of UST technical standards

(Subsection (1)(A)(iii)). There are three primary reasons the Associations support the expansion of the allowable uses.

First, the expansion provides increased flexibility to the States to address UST problems that are unique to their jurisdictions. For example, some States may be further along with their corrective action programs and would be better served shifting the funds into enforcement, which hopefully prevents leaks from occurring.

Second, each of the allowable uses in H.R. 688 are consistent with Congress' intent since 1984 to prevent, detect and promptly correct UST releases. The first permitted use (Subsection (1)(A)(i)) in H.R. 688, is existing law, while the fourth one (Subsection (1)(A)(iv)) acknowledges Congress' approval of EPA's historical practice of allowing the overwhelming majority of the LUST Trust Fund pass-throughs to the States to be used to oversee corrective actions by responsible parties -- that is, tank owners and operators. Thus, State use of the LUST Trust Fund monies for State tank trust funds (Subsection (1)(A)(ii)) and enforcement (Subsection (1)(A)(iii)) are the only real new uses under the legislation, and they are legitimate and necessary uses.

Third, the LUST Trust Fund has an unobligated balance today in excess of \$1 billion. Moreover, this year's expected interest on this unobligated balance should near or exceed the fiscal year 1997 appropriation to EPA. NACS and SIGMA want to make it very clear to the Subcommittee that the petroleum marketing community has been and remains prepared to do its share to reduce the Federal budget deficit; however, it should not be unreasonable for petroleum marketers to expect a return of the LUST Trust Fund monies for the permitted uses under H.R. 688 when the motor fuels excise tax used to finance the LUST Trust Fund largely was not passed through to consumers in the



selling price of gasoline and diesel fuel. To this end, the Associations are committed to working with the Appropriations Committees to maintain and, if possible, increase the LUST Trust Fund appropriation.

### **State Enforcement and Tank Trust Funds Should be Appropriate Uses**

SIGMA and NACS do not envision opposition from any quarter that the States be allowed to use LUST Trust Fund monies for enforcement of UST technical standards. In addition to the leak prevention gains I noted earlier, appropriate enforcement is necessary so as not to reward tank owners who have chosen to ignore EPA's ten-year upgrade period for those USTs that were in the ground and operating on December 22, 1988. NACS and SIGMA members, as well as others, have spent hundreds of millions of dollars complying with the law, and they expect enforcement so as not to render their economic expenditures meaningless.

NACS and SIGMA also support the use of LUST Trust Fund monies for enforcement because of concerns with Federal enforcement after December 22, 1998. OUST has announced a joint leak detection enforcement sweep with the States this May and has asked the EPA Regions to make UST leak detection a priority in fiscal year 1997. However, EPA enforcement planning documents for fiscal year 1998, which were leaked to the trade press, do not even mention USTs as an enforcement priority in the fiscal year when the critical compliance deadline falls. Hopefully, these documents are not the final word from the Agency, but it appears that OUST and the Office of Enforcement and Compliance Assurance are not on the "same page." While EPA may rely primarily on the States to take the lead in enforcing the December 1998 deadline, the Agency should exert strong leadership and should be willing to step in and enforce if a State fails to do an adequate job. EPA owes as much to the regulated

community that has obeyed the law and that has made significant expenditures.

The Associations also are aware of EPA and Members' concerns last year with the use of LUST Trust Fund monies by State tank trust funds to reimburse tank owners and operators for certain clean-up costs. These concerns largely have been couched in terms of Superfund's "polluter pays" policy. SIGMA and NACS strongly disagree with this characterization, particularly when Congress made State tank trust funds an acceptable financial assurance mechanism and encouraged such State reimbursement funds financed through tank fees paid by UST owners or operators.

Notwithstanding such disagreement, NACS and SIGMA concur with Subsections 1(A)(ii) and (v) in H.R. 688, providing that State trust funds could use the Federal LUST Trust Fund appropriations only for reasonable and necessary administrative expenses, except where limited funds are needed to reimburse a tank owner or operator who has cleaned up a leak and who, but for the reimbursement with the Federal monies, would be forced out of business.

### **Summary**

NACS and SIGMA believe that the enactment of H.R. 688 is an important step in increasing State flexibility as an important UST regulatory deadline -- that is, December 22, 1998 -- approaches. The expanded uses of the LUST Trust Fund monies all are based on the desire to increase protection of human health and the environment. The Associations believe that H.R. 688 is a balanced and reasonable bill that should proceed immediately through the legislative process on a bipartisan basis.

\* \* \* \*

NACS and SIGMA appreciate this opportunity to present their views. I will be happy to answer any questions the Associations' testimony may have raised.